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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

STATE OF MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary and Short Statement of Matter Involved.

The question involved in this cause is whether petitioners received the benefit of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, in their trial for murder, in the Circuit Court of Kemper County, Miss., and on their appeal to the Supreme Court of the State of Mississippi, from the judgment of said court, and sentence of death imposed therein.

Final judgment has now been entered against these petitioners by the Supreme Court of the State of Mississippi, the court of last resort in this state.

It is the contention of petitioners that due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, was denied to them, in that the State of Mississippi contrived their conviction by the knowing use of illegal and incompetent evidence, secured by officers and agents of the State in gross violation of the law.

The illegal and incompetent evidence here complained of consisted of incriminating statements secured from petitioners by officers of the State through the subjection of petitioners to physical torture, said statements being fraudulently offered by the State, on petitioners' trial, as free and voluntary confessions, and in defiance of Section 26 of the Constitution of the State of Mississippi, the pertinent portion of which reads:

> "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; *and he shall not be compelled to give evidence against himself;*" (Italics ours.)

Petitioners further contend that they were denied due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that their right to counsel, on said trial, was, in reality denied to them.

That they were denied due process of law, in that the trial judge entered judgment against them, and sentenced petitioners to death, at a time when he had lost jurisdiction of the cause through the denial to petitioners of fundamental rights. That no opportunity was afforded them to make proper motion for a new trial.

Further, that the decision of the Supreme Court of Mississippi is, itself, a denial of due process of law, in that

said decision arbitrarily denies to petitioners fundamental rights, guaranteed by the Federal Constitution.

It is contended by the State that its use of said confessions, in evidence, does not amount to a denial of due process of law, as guaranteed by the Federal Constitution, in that immunity from self-incrimination is not, in itself, an essential to due process of law.

That there was no denial of due process of law in the failure of the trial court to exclude said evidence of confessions, when its incompetency became apparent, in that no motion was made by petitioners to exclude same.

That Motion in Arrest of Judgment, and for New Trial came too late.

That there is no showing on the record that petitioners were, in reality, denied counsel by the trial court, in that the record does not disclose the conscious failure of counsel to discharge their duty.

Statement of Facts.

Petitioners, three ignorant negroes, (R. 126, 39, 51, 112) were indicted Wednesday, April 4, 1934, (R. 1) at an extension of the March term of the Circuit Court of Kemper County, Mississippi, (R. 164) for the murder of a white planter, (R. 77, 66, 67) Raymond Stewart, whose death occurred, (R. 8, 11) in said county on Friday of the week previous. (R. 6, 10.)

On a date not directly disclosed by the record, but, presumably, immediately following indictment, petitioners were arraigned, pled "Not Guilty" (R. 2) and counsel was appointed by the court to defend them. (R. 54). On the next day after indictment, April 5, 1934, petitioners were put on trial for their lives. (R. 3.)

On said trial the state based its charge of murder on alleged confessions, which it offered as freely and voluntarily

made by petitioners, (R. 25, 35, 37, 39), while confined in the Meridian (Lauderdale County) jail, (R. 25, 34, 38) for safekeeping. (R. 23, 70.)

At the request of petitioners' counsel a preliminary examination was had of Sheriff Adcock (R. 20) the first witness by whom the state sought to prove the confessions, to determine whether the confessions were free and voluntary. Said examination revealed that during the early part of the questioning petitioners held back, and refused to make a complete statement, (R. 23), but under pressure began to talk (R. 23-24) and were then constantly corrected by Adcock when their statements met with his disapproval. (R. 23-24.) The sheriff admitted hearing of a prior confession (R. 24) and that at this time one of the petitioners bore marks of physical mistreatment, which the negro informed him was the result of whippings (R. 24), but that he was not advised and did not inquire concerning the details. (R. 24.)

Petitioners' objection to the introduction of the purported confessions was thereupon overruled (R. 25) and the testimony of Sheriff Adcock, and others who were with him at the time of said statements, was then admitted over repeated objections (R. 25, 35, 41), after which the state rested its case. (R. 41.)

Whereupon petitioners, in their own defense, testified that the alleged confessions were false (R. 43, 59, 66, 71) and procured by officers of the state, and others, by force and violence, enroute to, and in the Meridian jail. (R. 43, 58, 59, 71.) That they denied guilt until cruelly beaten (R. 43, 59, 70, 71) and threatened with death (R. 47) if necessary to coerce a confession; and that they were threatened with further punishment if they changed their story. (R. 60, 61, 55, 72.)

That on the night following the whippings the petitioners were subjected to questioning by Sheriff Adcock of Kemper

County and Sheriff Stevens of Lauderdale County, and certain other officers and persons, (R. 43, 59, 71, and that they repeated the stories they were forced to make under the lash because of fear of further punishment. (R. 60, 61, 55, 72.)

The record shows that during the trial the scars and wounds of petitioners were plainly visible, and that the attention of the court and jury was directed thereto. (R. 43, 69, 72.)

The state offered in rebuttal the testimony of a deputy sheriff, and certain others, who admitted that the negroes denied guilt until whipped. (R. 102, 106, 112, 113, 114).

An examination of the record will disclose that the only evidence of consequence, against petitioners, was the so-called "confessions." (See opinions, R. 135, 175-176.)

After hearing the evidence, argument of counsel, and instructions of the court, the jury returned a verdict of "Guilty" as to each of the petitioners; (R. 2-3) whereupon the court entered its judgment, and sentenced petitioners to be hung by the neck until dead. (R. 3.)

From this judgment petitioners appealed to the Supreme Court of Mississippi (R. 125) assigning as the principal ground of error the admission of said incriminating statements, as purported confessions. (R. 127.)

The Supreme Court affirmed the judgment of the lower court in the decision rendered by it on appeal, (R. 127), and entered its judgment, (R. 137) resetting the date for execution, a dissenting opinion being delivered by Justice Anderson. (R. 135.)

Petitioners thereupon filed in the Supreme Court of Mississippi their Suggestion of Error, (R. 138), said Suggestion asserting the Federal questions with reference to denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as hereinbefore set out. (P. 2.)

As an accompaniment to the Suggestion of Error, a Motion in Arrest of Judgment, and For a New Trial was filed; (R. 141) said Motion being filed in the appellate court, as stated therein, under the theory that no opportunity had been afforded in the lower court for filing same. Said Motion was supported by affidavits of petitioners (R. 149, 153, 157) and counsel (R. 146) appointed by the lower court to represent them in the trial; said affidavits setting forth the manner in which the alleged confessions were coerced, and the further facts that counsel had no access to petitioners for sufficient time to allow preparation of the case, or to acquaint counsel with the facts.

The Suggestion of Error was overruled by the Court, and final judgment entered (R. 179). In its opinion on said Suggestion of Error, (R. 166) the court held, in regard to the Federal questions raised by petitioners, that immunity from self-incrimination is not essential to due process of law, within the meaning of the 14th Amendment to the Federal Constitution; and that failure to exclude confessions which were competent when admitted, after introduction of evidence tending to show their incompetence, in absence of request so to do, does not deny due process of law, within the meaning of the 14th Amendment to the Federal Constitution.

The court further held that the record does not disclose that counsel appointed by the court consciously failed to discharge any duty they owed appellants; and the court declined to consider the Motion in Arrest of Judgment and For New Trial, on the ground that said Motion would not lie in the Supreme Court, same being a court of appellate jurisdiction only.

A dissenting opinion was delivered by Justice Griffith, concurred in by Justice Anderson. (R. 173.)

In its final judgment, the Supreme Court re-set the date of execution of petitioners for June 6, 1935. (R. 179.)

Pursuant to Petition for Stay of Execution, (R. 179) the Supreme Court of Mississippi entered its order (R. 180) staying the execution of petitioners for a sufficient time to allow the presentation to this Honorable Court of Petition for Certiorari.

II.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of the State of Mississippi has decided the Federal questions herein involved, in a manner directly in conflict with the decisions of the Supreme Court of the United States, in the following cases:

Mooney v. *Holohan,* —— U. S. ——, 79 L. Ed. 347;
Powell v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;
Snyder v. *Massachusetts,* 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;
Moore v. *Dempsey,* 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. Rep. 265;
Twining v. *New Jersey,* 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14;
Hopt v. *Utah,* 110 U. S. 574, 28 L. Ed. 262;
In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149.

2. Due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, has been denied to petitioners, by the State of Mississippi, in that:

(a) A fair and just hearing has been denied to petitioners by the fraud of the State in its knowing use of illegal and incompetent evidence, secured by officers and agents of the State, in violation of the law.

Mooney v. *Holohan,* —— U. S. ——, 79 L. Ed. 347;
Moore v. *Dempsey,* 261 U. S. 86, 67. L. Ed. 543, 43 Sup. Ct. Rep. 265;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;
Chicago, B. & Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;
Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676.

(b) A fair and just hearing has been denied to petitioners by the State of Mississippi, in that petitioners were, in reality, denied counsel, in the trial of said cause.
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

(c) The trial court entered its judgment against petitioners, and sentenced them to death, at a time when it had lost jurisdiction of said cause, by the denial of due process of law to petitioners, in the trial of the case.
In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

(d) Equal protection of the laws, within the meaning of the Fourteenth Amendment to the Federal Constitution, has been denied petitioners, in that no opportunity was allowed by the trial court for Motion for a New Trial, and the Supreme Court of the State of Mississippi refused a consideration of same, when filed therein.
State v. *Guerringer*, 265 Mo. 408, 178 S. W. 65;
Duncan v. *Missouri*, 152 U. S. 382.

(e) The decision of the Supreme Court of Mississippi is, itself, a denial of due process of law, in that said decision arbitrarily denies to petitioners fundamental rights.

Snyder v. *Massachusetts*, 291 U. S. 97; 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;
Twining v. *New Jersey*, 211 U. S. 78;
Rogers v. *Peck*, 199 U. S. 425;
Maxwell v. *Dow*, 176 U. S. 581;
Hurtado v. *California*, 110 U. S. 516;
Frank v. *Mangum*, 237 U. S. 309;
Powell v. *Alabama*, 287 U. S. 45, 67;
Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347.

3. There is no state question sufficient to support the decision of the court, to the exclusion of the Federal question involved.

WHEREFORE petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Mississippi, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 31,375, *Ed Brown, et al.*, versus *The State of Mississippi*," to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Mississippi be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, July 3, 1935.

ED BROWN,
HENRY SHIELDS,
YANK ELLINGTON,
By J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

STATE OF MISSISSIPPI

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The majority opinion of the Supreme Court of Mississippi, (R. 127) —— Miss. ——, 158 So. 339, was rendered January 7, 1935.

The dissenting opinion, by Justice Anderson, of the Supreme Court of Mississippi, (R. 135) —— Miss. ——, 158 So. 343, was rendered January 7, 1935.

The majority opinion of the Supreme Court of Mississippi, on Suggestion of Error, (R. 166) —— Miss. ——, Advance Sheet No. 3, Vol. 161 So. 465, was rendered April 29, 1935.

The dissenting opinion on Suggestion of Error, delivered by Justice Griffith, Anderson, J., concurring (R. 173) —— Miss. ——, Advance Sheet No. 3, Vol. 161 So. 470, was rendered April 29, 1935.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 29, 1935. (R. 179.)

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code, as amended by Act of February 13, 1925; 43 Statutes at Large 937, Section 344 U. S. C. A., Title 28.

3. In their Suggestion of Error, filed in the Supreme Court of the State of Mississippi (R. 138), petitioners specially set up and claimed rights and privileges accorded to them under the Constitution of the United States, said rights and privileges being in relation to due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution.

Petitioners asserted, in said Suggestion of Error, as they now represent to this Honorable Court, that their Constitutional right to due process of law, in their trial for murder, by the Circuit Court of Kemper County, Miss., and on appeal to the Supreme Court of Mississippi, had been violated by the State of Mississippi in the following particulars:

(a) By the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State. (R. 139, 140.)

(b) By the denial to petitioners, in reality, of representation by counsel. (R. 140.)

(c) By the judgment of the trial court, and its affirmance by the Supreme Court of Mississippi, in that the trial court had lost jurisdiction to enter said judgment, because of the denial of due process of law to petitioners, in the trial of said cause. (R. 140.)

4. In its Opinion on Suggestion of Error (R. 166), dissented to by Justices Griffith and Anderson (R. 173), the Supreme Court of the State of Mississippi considered the Federal questions therein raised and overruled same, thereby establishing and confirming the jurisdiction of this Honorable Court to review the proceedings herein; and the judgment and opinions of the Supreme Court of Mississippi, insofar as same relate to a denial of due process of law, to petitioners, within the meaning of the Fourteenth Amendment to the Federal Constitution.

The following authorities are in point as to the jurisdiction of this Honorable Court to review the Federal questions raised herein:

Great Northern Ry. Company v. *Sunburst Oil and Refining Company*, 53 Sup. Ct. Rep. 145, 287 U. S. 358, 77 L. Ed. 360;

Nickey v. *State of Mississippi*, 54 Sup. Ct. Rep. 743, 78 L. Ed. 1323, 292 U. S. 393;

Consolidated Turnpike Co. v. *Norfolk, etc., R. Co.*, 228 U. S. 326, 33 Sup. Ct. Rep. 510, 57 L. Ed. 857;

Atchison, etc. R. Co. v. *Harold*, 241 U. S. 371, 36 Sup. Ct. Rep. 665, 60 L. Ed. 1050;

San Jose Land, etc. Co. v. *San Jose Ranch Co.*, 23 Sup. Ct. Rep. 487, 189 U. S. 177, 180, 47 L. Ed. 765;

Mallet v. *North Carolina*, 181 U. S. 589, 21 Sup. Ct. Rep. 730, 45 L. Ed. 1015.

5. Further, there is no State question sufficient to support the decision of the Court, to the exclusion of the Federal question involved.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-7), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the State of Mississippi contrived the conviction of petitioners, in the trial court, by the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State; such use amounting to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that petitioners were, in reality, denied representation by counsel, in the trial court, and hence were denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the trial court had lost jurisdiction to enter said judgment, in the trial of said cause,

because of the denial of due process of law to petitioners, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Mississippi erred in refusing to consider Motion in Arrest of Judgment, and for New Trial, filed therein, and in affirming the judgment of the lower court, in that no opportunity was afforded petitioners for filing said Motion in the lower court; thereby denying to petitioners due process of law, as provided by the Fourteenth Amendment to the Federal Constitution, in that they were denied equal protection of the law.

5. The Supreme Court of the State of Mississippi erred in entering its judgment herein, and in its decision of said cause, in that said decision and judgment are, within themselves, denials of due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that through them the court denies to petitioners their fundamenal rights.

V.

Summary of the Argument.

Point A.

Petitioners were denied due process of law by the fraud of the State, through its agents.

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97; 29 Sup. Ct. Rep. 14;

Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. Rep. 265;

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;

Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347;
Chicago, B. and Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;
Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676.

POINT B.

Petitioners were denied due process of law, through denial of counsel.

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

POINT C.

Petitioners were denied due process of law, in that the trial court possessed no jurisdiction to enter judgment.

In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

POINT D.

Petitioners were denied due process of law, in that they were denied equal protection of the law.

State v. *Guerringer*, 265 Mo. 408, 178 S. W. 65;
Duncan v. *Missouri*, 152 U. S. 382.

POINT E.

The decision of the Supreme Court of Mississippi is, itself, a denial of due process of law.

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330; *Twining* v. *New Jersey*, 211 U. S. 78; *Rogers* v. *Peck*, 199 U. S. 425; *Maxwell* v. *Dow*, 176 U. S. 581; *Hurtado* v. *California*, 110 U. S. 516;

Frank v. *Mangum*, 237 U. S. 309; *Powell* v. *Alabama*, 287 U. S. 45; *Mooney* v. *Holohan*, —— U. S. ——, 79 L. Ed. 347.

VI.

ARGUMENT.

Point A.

Petitioners were denied due process of law by the fraud of the State, through its agents.

This Court has long since established that one of the absolute essentials of due process of law, as provided by the Fourteenth Amendment to the Federal Constitution, is a fair and impartial trial.

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14;

Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. Rep. 265;

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;

Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

Further, this Court has long since decided that due process of law is denied by a State, when prevented through the wrong of its officers and agents.

Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347;

Chicago, B. and Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;

Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;

Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

In the trial of this cause the State of Mississippi based its charge of murder against these petitioners upon incriminating statements, coerced from petitioners by officers of the State, through physical violence, and offered by the State as free and voluntary confessions. (R. 41-78 and 25-41.)

This action on the part of the State constituted a double fraud. Not only did it offer illegal evidence, in view of Section 26 of the Constitution of the State of Mississippi; but by introducing these statements, obtained under duress, the State of Mississippi offered evidence essentially false, and tainted further by the criminal manner in which the statements were secured.

For the convenience of the Court we again quote the pertinent portion of Section 26 of the State Constitution;

> "In all criminal prosecutions the accused * * * shall not be compelled to give evidence against himself;"

It is conceded that the repetition of said statements, on the day following their original extortion, was likewise under duress, in that the statements were repeated under fear of further punishment by officers of the State; and for this reason would be inadmissible, also, under the Constitution and laws of the State of Mississippi.

Banks v. *State,* 47 So. 437, 93 Miss. 700;
Mackmasters v. *State,* 82 Miss. 459;
Whitley v. *State,* 78 Miss. 255;
Fisher v. *State,* 145 Miss. 116, 110 So. 361.

In this connection, therefore, the language of the Supreme Court of the United States, in the case of *Mooney* v. *Holohan,* —— U. S. ——, 79 L. Ed. 347, is peculiarly applicable.

This Court, on page 349 of the opinion, as reported in 79 L. Ed., said:

> "It [due process of law] is a requirement that cannot be satisfied by mere notice and hearing if a State has

> contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of the laws, may constitute state action within the purview of the Fourteenth Amendment."

On the ground of fraud, there is very little to choose between the act of the State, referred to in *Mooney* v. *Holohan, supra,* and the act of the State in the present case. The State of Mississippi, through its use, as confessions, of statements literally whipped, word for word, from petitioners, presented evidence as false as perjury. The fraud in the two cases, as to the introduction of false testimony, is essentially the same.

In the instant case, however, the fraud of the State is aggravated by the infamous mistreatment, on the part of the State, which resulted in the alleged confessions.

We earnestly contend, therefore, that the State of Mississippi, by its use of illegal, false and highly prejudicial evidence, so completely prevented a fair and impartial trial of petitioners, as to vitiate the whole proceedings against them, on the ground of denial of due process of law, as provided by the Fourteenth Amendment to the Federal Constitution.

Point B.

Petitioners were denied due process of law, through the denial of counsel.

In the recent case of *Powell* v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55, this Court, in discussing the

requirement of the Fourteenth Amendment to the Federal Constitution, as to due process of law, ruled very positively that the right to a hearing, as a basic element of due process of law, includes the right to the aid of counsel.

This Court further held, on page 71 of its opinion, (287 U. S.):

> "* * * In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *Holden* v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383, *supra*."

In the instant case, the record discloses the following facts, in connection with the appointment of counsel, and the necessity for same:

That petitioners are ignorant and pauper negroes. (R. 126, 39, 51, 112.)

On April 4, 1934, they were indicted for murder. (R. 1.) On April 5, 1934, they were put to trial for their lives. (R. 3.)

On a date not directly disclosed by the record, but necessarily in the interval of time between the indictment and trial, petitioners were arraigned and counsel appointed by the court to defend them. (R. 2, 54.)

Under the rule as laid down by this Court, and in view of the fact that these negroes are ignorant paupers, the court was under the positive duty of appointing them counsel at

a time, and under circumstances, which would, in fact, allow the defense adequate preparation.

This the trial court did not do. It is apparent that counsel for petitioners had no real opportunity to prepare themselves for the trial of this cause. The element of time alone precluded them.

Further than this, in their Motion for New Trial, (R. 141), and especially in the affidavit, in support thereof, by Mr. John A. Clark, (R. 146) one of counsel appointed to defend these petitioners, it is established that the short and inadequate conference which petitioners had with their counsel, was constantly interrupted by messages from the court to get through as rapidly as possible. That Cliff Dial, the deputy who had whipped petitioners, stood at the door of the conference room, and so intimidated petitioners by his presence that they whispered to counsel that they were afraid to discuss the case. That no private conference, between petitioners and counsel, was ever allowed as a deputy sheriff was constantly in the room. That counsel had no opportunity to confer with the defense witnesses, and no opportunity to learn anything about the case save from a smattering, whispered conversation with petitioners, under strained circumstances.

In view of these facts, we respectfully submit that petitioners were denied due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that the trial court failed, in reality, to provide them counsel.

POINT C.

Petitioners were denied due process of law, in that the trial court possessed no jurisdiction to enter judgment.

In the case of *Powell* v. *Alabama, supra,* on page 68 of the opinion, 287 U. S., the Supreme Court of the United States said:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps *essential to the passing of an enforceable judgment,* and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." (Italics ours.)

In the two preceding points, we have demonstrated to this Court that one of the preliminary steps, essential to an enforceable judgment is lacking in this cause, in that by the fraud of the State, and the denial of counsel, petitioners have not been accorded a hearing, or, as the word is often interpreted, a fair and impartial trial.

It is evident then, with this preliminary step lacking, that the trial court was without authority to enter a binding judgment against these petitioners, and its attempt to do so, was a denial of due process of law.

Quoting again from *Powell* v. *Alabama, supra,* the Court, on page 68 of the opinion (287 U. S.), said:

> "Mr. Justice Field, in an earlier case, *Galpin* v. *Page,* 18 Wall. 350, 368, 21 L. Ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

In the case of *Nielsen,* 131 U. S. 176, 33 L. Ed. 118, the Supreme Court of the United States again expressed the rule that the denial of a Constitutional right destroys the validity of the hearing, and the judgment of the court thereon. The Court, on page 183 of the opinion (131 U. S.), said:

> "In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant."

See also *In re Bonner*, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323.

Under the above authorities, therefore, we submit that petitioners' rights to due process of law, under the Fourteenth Amendment to the Federal Constitution, were denied by the entry of judgment by the trial court, and its affirmance by the appellate court.

POINT D.

Petitioners were denied due process of law, in that they were denied equal protection of the law.

Petitioners filed a Motion for New Trial and in Arrest of Judgment, (R. 141) in the Supreme Court of Mississippi, on the theory that no opportunity had been afforded for filing same in the lower court. The motion and affidavits in support thereof, revealed that petitioners were sentenced one night, after which they were carried to a jail in an adjoining county; and that early the next morning the court adjourned.

Under Mississippi practice, every person is given the right to make motion for a new trial; but according to the circumstances in this case, petitioners were deprived of this right. Had the opportunity been afforded, and had counsel appointed by the court taken advantage thereof,

the technicality on which the Supreme Court relied in affirming the case, on original appeal, would probably have been swept away.

While the right of making motion for a new trial is not essential to due process of law, yet if this privilege be allowed to some persons and not to all persons similarly situated, such deprivation of the right to make the motion is equivalent to denial of due process of law, for due process of law and the equal protection of the laws are secured only when—

> "* * * the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government." 152 U. S. 377, at page 382.

For the errors of the trial court in failing to control its sittings and adjournments so as to afford petitioners a like opportunity with others similarly situated, to make a motion for a new trial, we think reversal must follow:

> "Surely it is better that justice travel with a leaden foot, rather than that she should walk roughshod over the constitutional rights of citizens, to be equal one with another before the law."
>
> *State* v. *Guerringer*, 265 Mo. 408, 178 S. W. 65, at page 418.

Point E.

The decision of the Supreme Court of Mississippi is, itself, a denial of due process of law.

In the case of *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330, the Supreme Court of the United States defined the limits within which a state may regulate the procedure of its courts, in consonance with due process of law, as required by the Fourteenth Amendment to the Federal Constitution.

On page 105 of its opinion (291 U. S.), the Court said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112; *Rogers* v. *Peck,* 199 U. S. 425, 434; *Maxwell* v. *Dow,* 176 U. S. 581, 604; *Hurtado* v. *California,* 110 U. S. 516; *Frank* v. *Mangum,* 237 U. S. 309, 326; *Powell* v. *Alabama,* 287 U. S. 45, 67."

In the instant case, the Supreme Court of Mississippi attempts to defeat the right of petitioners, defendants in the trial court, to a fair and impartial trial, and this by a mere rule of procedure.

As we have previously stated, the only evidence of any consequence, introduced by the State against these petitioners was the so-called confessions, (See opinions, R. 135, 175-176) illegally obtained by the State, and fraudulently introduced (R. 41-78), and in denial of rights under the Constitution of the State of Mississippi,

In its Opinion on Suggestion of Error, in this cause (R. 166), the Supreme Court of Mississippi admits the illegality of the so-called confessions, under the Constitution of the State of Mississippi, in that they were forced self-incrimination (R. 168); the court expresses its horror of the manner in which the statements were extorted (R. 173), but in spite of these facts the court rules that because no motion to exclude was made by petitioners after it became apparent that said statements had been extorted by violence, that petitioners waived all right to charge the admission of said evidence as error, both under the Constitution of the State of Mississippi, and the due process clause of the Fourteenth Amendment to the Federal Constitution. (R. 168-169.)

In view of the settled law that waiver is the deliberate abandonment of a known right; in view of the further fact that petitioners objected to the so-called confessions, when they were first introduced, on the ground that they were not free and voluntary (R. 35, 41); that the whole defense was predicated upon a denial of the truth of said statements, and an exposition of the shameful and hideous manner in which they were extorted, it is inconceivable to us that the doctrine of waiver is here correctly applied.

Further than this, such waiver, if attempted, would be void as against public policy. Under the law petitioners could not waive their objection to the use by the state of deliberate fraud. *Coppell* v. *Hall,* 7 Wall. 542, 19 U. S. (L. Ed.) 244; *Motor Contract Co.* v. *Van Der Volgen,* 162 Wash. 449, 298 Pac. 705, 79 A. L. R. 39.

And certainly they could not waive their objection to a fraud which, on their trial, denied to them fundamental rights, and thus secured their conviction and sentence of death.

On this point the Supreme Court of the United States, in *Hopt* v. *Utah,* 110 U. S. 574, 28 L. Ed. 262, at page 579 of the opinion, 110 U. S., used the following language:

> "The natural life, says Blackstone 'Cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody to object to unauthorized methods."

But sweeping all argument as to waiver aside, the State of Mississippi, in its destruction of petitioners' fundamental rights, likewise destroyed the validity of their trial. *Mooney* v. *Holohan, supra.* Because of the fraud of the State the binding effect of the whole proceeding against these petitioners was totally vitiated and destroyed; and under these circumstances the waiver of petitioners, if it can properly be said that there was one, was of no more effect than the illegal and void proceedings which occurred prior thereto.

We submit, therefore, that it is apparent that any rule of procedure adopted by the Supreme Court of Mississippi, which serves as a device by which the court may ignore the denial in the lower court of those fundamentals essential to due process of law, is so arbitrary and unjustifiable a denial of essential justice, as to be within itself a denial of due process of law. And especially does this seem true in that the error in procedure was committed by counsel appointed by the court at a time, and under circumstances, which made adequate representation impossible. *Klatsky* v. *Hatch,* 157 N. Y. S. 878.

VII.

Conclusion.

In conclusion petitioners submit that under the facts, and the law, as hereinbefore set out, they have been deprived of their rights to due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, on their trial, in the Circuit Court of Kemper County, Miss., and on their appeal to the Supreme Court of the State of Mississippi.

Petitioners, therefore, appeal to this Honorable Court for the protection of their rights, as citizens of the United

States, under the Constitution of the United States, by the issuance from this court of writ of certiorari, addressed to the Supreme Court of Mississippi, in order that this court may consider this cause on the merits, and that, thereupon, final justice may be done.

Respectfully submitted,

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(6656-C)